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8 THE HONORABLE MARSHA J. PECHMAN
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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 GILLIAN B. LOYA, as Personal Representative
14 of the Estate of RICARDO LOYA, deceased,
15 and as Litigation Guardian Ad Litem for I. Loya
16 and G. Loya, the surviving minor children of the
17 decedent, RICARDO D. LOYA,

18 Plaintiffs,

19 v.

20 STARWOOD HOTEL AND RESORTS, et. al.

21 Defendants.

22 Case No. C06-0815 MJP

23 **MOTION FOR SANCTIONS**

24 **NOTE ON MOTION DOCKET:
MARCH 30, 2007**

25 **I. RELIEF REQUESTED**

Plaintiffs Loya move for an order of default against defendant Raintree Resorts, International (RRI) for failure to make discovery in violation of this Court's order. Alternatively, plaintiffs Loya move that RRI's jurisdictional and venue defenses be rejected as a sanction for RRI's failure to make discovery in violation of this Court's order.

II. FACTUAL BACKGROUND

This is a wrongful death action. Defendant RRI has filed a motion to dismiss contending that this Court does not have personal jurisdiction over it and that this Court is

1 not an appropriate action for this venue. This Court ordered plaintiffs be allowed to
 2 conduct jurisdictional discovery.

3 Part of plaintiffs' claims regarding jurisdiction involve the assertion that RRI was
 4 acting as the "alter ego" of its subsidiaries. *See e.g. Morgan Bros. Inc. v. Haskell Corp.*,
 5 24 Wash. App. 773, 604 P.2d 1294 (1979)¹; *Standard Fire Insurance Co. v. Blakeslee*, 54
 6 Wash. App. 1, 771 P.2d 1172 (1989)².

7 Plaintiffs Loya properly served discovery requests on RRI which were designed to
 8 elicit facts regarding, among other things, plaintiffs' "alter ego" arguments relating to
 9 jurisdiction. These requests were served on December 6, 2006 (Interrogatories).

10 Responses were due 30 days from the date of service.

11 **III. PROCEDURAL HISTORY**

12 On September 27, 2006, defendant RRI moved to dismiss the Loyas' claim based
 13 on a lack of personal jurisdiction and venue. *See Redacted Motion to Dismiss*, Docket #
 14 87. The Loyas filed a response and declarations opposing this motion. *See Redacted*
 15 Pleading documents 104. In ruling on RRI's motion this Court held:

16 This matter comes before the Court on Defendants' Motion to Dismiss
 17 (Dkt. No. 25-1). Having reviewed the parties' briefing, as well as all
 18 pertinent documents and exhibits, the Court concludes that Plaintiffs
 19 should have additional time for discovery in order to establish a more
 20 complete record on the issue of whether the Court has personal jurisdiction

21 ¹ In Morgan the Court stated:

22 An overt intent to disregard the corporate entity will not be implied from the presence of
 23 common directors, shareholders, or business address alone. ... Where, however, other facts
 24 are present, such as evidence of serious confusion about the manner and capacity in which
 25 a parent and subsidiary or their respective representatives are acting, the court may be
 26 justified in disregarding the corporation.

² In Standard Fire Insurance the Court stated:

27 Application of the alter ego doctrine to attribute to a corporation the acts of its officers and
 28 directors does not, contrary to appellant's assertion, result in disregard of the corporate
 29 entity. When the doctrine is applied to impute to the corporation the act of the individual, it
 30 is merely an acknowledgment that an individual who dominates and controls a corporation
 31 by necessity acts with the implied knowledge, consent and ratification of that corporation

1 over Defendant Raintree Resorts International. The Court grants a
 2 discovery period of 45 days from the date of this order. Upon the
 3 completion of discovery, the Court will revisit Defendants' motion to
 4 dismiss. (Docket No. 42)

5 Plaintiffs Loya filed discovery requests against RRI on in December 2006. To
 6 date, RRI has not responded to these requests. Stafne declaration. Counsel for RRI and
 7 the Loyas held a conference regarding RRI's failure to make discovery. Id. During that
 8 conference counsel for RRI promised to have discovery response to plaintiffs' counsel on
 9 Thursday, March 8, 2007. Id. Notwithstanding this promise, defendant RRI has failed to
 10 make discovery. Id. Plaintiffs Loya's counsel have sent RRI's counsel several emails
 11 regarding this situation; but RRI still refused to make good faith discovery. Id.

12 As can be seen, plaintiffs Loya have complied with the requirements of LR 37 and
 13 defendant has not complied with FRCP 26, FRCP 33, and FRCP 37.

14 **IV. ISSUES**

15 Should Plaintiffs' Motion for default against defendant RRI be granted as a
 16 discovery sanction where RRI has refused to comply with this Court's order regarding
 17 jurisdictional discovery?;

18 Should Plaintiffs' Motion for an adjudication of the personal jurisdiction and
 19 venue claims against defendant RRI be granted as a discovery sanction where RRI has
 20 refused to comply with this Court's order regarding jurisdictional discovery?;

21 Should terms should be awarded against defendant?

22 **V. EVIDENCE RELIED UPON**

- 23 1. Declaration of Scott E. Stafne;
- 24 2. Stafne's Certificate of Compliance;
- 25 3. Plaintiff's emails regarding outstanding discovery;
4. Defendant's emails regarding outstanding discovery;
5. Outstanding discovery requests.

ARGUMENT:

1 Discovery is available in federal court to establish the presence of personal
 2 jurisdiction. see, e.g., *Butcher's Union Local No. 498, United Food & Comm'l Workers v.*
 3 *SDC Investment, Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) ("Discovery should ordinarily be
 4 granted where pertinent facts bearing on the question of [personal] jurisdiction are
 5 controverted or where a more satisfactory showing of the facts is necessary.' ") As
 6 previously noted, this Court ordered plaintiffs be allowed to take jurisdictional discovery.

7 A.) DEFAULT AS A DISCOVERY SANCTION.

8 The Ninth Circuit uses a five-part "test" to determine whether a dismissal sanction
 9 is just. *See e.g. Valley Engineers v. Electric Engineering Co.*, 158 F.3d 1051 (9th Cir.
 10 1998). The five parts of this test include:

11 "(1) the public's interest in expeditious resolution of litigation; (2) the
 12 court's need to manage its dockets; (3) the risk of prejudice to the [party
 13 seeking sanctions]; (4) the public policy favoring Disposition of cases on
 14 their merits; and (5) the availability of less drastic sanctions."

15 *Malone v. United States Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987).

16 The Ninth Circuit has said that where a court order is violated, factors 1 and 2
 17 support case dispositive sanctions; *i.e.* default. Factors 3, 4, and 5 often support the
 18 imposition of less drastic sanctions *Adriana International Corp. v. Thoeren*, 913 F.2d
 19 1406, 1412 (9th Cir. 1990). In *Adriana* the Court of Appeals noted that factor 5 involves
 20 consideration of three subparts: whether the court explicitly discussed alternative
 21 sanctions, whether it tried them, and whether it warned the recalcitrant party about the
 22 possibility of dismissal. *Malone v. United States Postal Service*, 833 F.2d 128, 132 (9th
 23 Cir. 1987). But despite all this elaboration of factors, the Ninth Circuit has said that it is
 24 not always necessary for the court to impose less serious sanctions first, or to give any
 25

1 explicit warning. *Adriana*, 913 F.2d at 1413; *See also Valley Engineers v. Electric*
 2 *Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998).

3 The Ninth Circuit has recognized that what is critical with regard to "case
 4 dispositive" sanctions is whether the discovery violations "threaten to interfere with the
 5 rightful decision of the case." *Adriana*, 913 F.2d at 1412. Dismissal is appropriate where
 6 a "pattern of deception and discovery abuse made it impossible" for the district court to
 7 conduct a trial "with any reasonable assurance that the truth would be available."
 8 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995).

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 10 "There is no point to a lawsuit, if it merely applies law to lies." Where a
 11 district court believes a party's discovery violations make it impossible for the
 12 court to be confident that the parties will ever have access to the true facts a case
 13 dispositive sanction is appropriate. *See e.g. Valley Engineers v. Electric*
 14 *Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998).

15 In this case, RRI has filed declarations in support of its motion to dismiss for lack
 16 of jurisdiction and venue which are odds with facts that have been testified to.
 17 COMPARE e.g.: Tucker's declaration and supplemental declaration in support of RRI's
 18 motion to dismiss with his deposition testimony attached to Stafne's declaration in
 19 support of plaintiffs' motion for partial summary judgment re jurisdiction pursuant to
 20 RCW 64.36.

21 RRI's violation of this Court's discovery order meets the five tests for imposing a
 22 case dispositive sanction. First, the Washington legislature has made clear that
 23 Washington's regulation of time share operations like those involved in this case by RRI
 24 affects the public interest. RCW 64.36. Second, this Court's need to manage its own

1 docket so as to prevent any party from asserting a non-meritorious lack of personal
 2 jurisdiction claim which the party is not prepared to back up by making appropriate
 3 discovery. Third, RRI's refusal to disclose jurisdictional evidence a few weeks before
 4 summary judgment on this issue is akin to requiring the Loyas to proceed to a trial
 5 without disclosure of relevant facts. Even if disclosure is made tomorrow RRI will have
 6 precluded the plaintiffs' ability to test the disclosures through additional discovery.
 7 Fourth, the policy favoring disposition of cases on the merits does not apply here as RRI
 8 has attempted to prevent such a disposition by factual misrepresentations and failing to
 9 make discovery. Finally, the only less drastic sanction which would make plaintiff whole
 10 under these circumstances would be for this Court to strike RRI's personal jurisdiction
 11 and venue defenses.

13 B.) ADVERSE FACTUAL FINDINGS REGRADING JURISDICTION AND
 14 VENUE AS A DISCOVERY SANCTION.

15 In *Gibson v. Chrysler Corporation*, 261 F.3d 927 (9th Cir. 2001) the Court of
 16 Appeals stated:

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 18 It is true that an appropriate discovery sanction for refusing to respond to
 19 discovery requests on jurisdictional facts can be an adverse finding on the
 20 factual issue. For example, in *Insurance Corp. of Ireland, Ltd. v.*
 21 *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Supreme
 22 Court sustained a sanction that found the facts necessary to establish
 23 personal jurisdiction over a recalcitrant defendant. Although we have not
 24 found a case directly on point, we see no reason why a court cannot, in an
 25 appropriate case, sanction a defendant who refuses to respond to
 26 appropriate discovery requests on a fact relevant to subject matter
 27 jurisdiction by entering an order establishing that fact as true.

28 Subject matter jurisdiction cannot be established by consent of the parties,
 29 and a lack of subject matter jurisdiction is a non-waivable defect. See, e.g.,
 30 *Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365, 377 n. 21 (1978).
 31 But a sanction in the form of an adverse factual finding rests on neither
 32 consent nor waiver. Rather, it rests on the reasonable assumption that the

1 party resisting discovery is doing so because the information sought is
2 unfavorable to its interest. In such a case, the sanction merely serves as a
3 mechanism for establishing facts that are being improperly hidden by the
4 party resisting discovery. See Fed. R. Civ. P. 26(g)(3), 37(b)(2)(A);
5 Chilcutt v. United States, 4 F.3d 1313, 1324 (5th Cir. 1993).

6 Here, RRI's failure to produce discovery about the ownership and control
7 of its various subsidiaries should be seen for what it is; an attempt to hide facts
8 from this Court and the plaintiffs. This Court should not sanction RRI's attempt
9 at an end run around the judicial process. This Court should hold that this Court
10 has jurisdiction over RRI and venue over the plaintiffs' claims against RRI.

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12 Respectfully Submitted,

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